

Treaty Indian Tribes And The Endangered Species Act



Tribal fishermen have modified their fisheries to protect species such as the threatened marbled murrelet.

Introduction

For more than a decade, tribes in the Pacific Northwest have addressed Endangered Species Act concerns. ESA issues affecting tribes arise in the context of on-reservation resource management and tribal development activities, as well as off-reservation resource management issues, including the exercise of treaty-reserved fishing, hunting and gathering rights.

While the ESA offers a promise of protection and restoration of endangered or threatened fish, wildlife and plant species that are important aspects of tribal religions, cultures and economies, it also poses a threat to tribal sovereignty and treaty rights.

The ESA and Pacific Northwest salmon have crossed paths only a few times. There are currently six salmonid populations in the Pacific Northwest with ESA protection: Snake River sockeye and upper Columbia River steelhead are listed as endangered; Snake River spring/summer chinook, Snake River fall chinook, Snake River steelhead and Oregon's Umpqua River cutthroat trout are listed as threatened.

The number of listed species is expected to grow in the next few years. The National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (USFWS) are undertaking comprehensive status reviews of all salmonids on the West Coast.

The review of West Coast chinook salmon, including Puget Sound chinook, will be completed in February, and it is expected that Puget Sound chinook will be recommended for listing as a "threatened" species under ESA. Chum and sockeye salmon reviews will be completed in early January. Hood Canal summer chum salmon and Lake Ozette sockeye salmon are also expected to be listed.

An extended review of Washington coho salmon stocks isn't expected to be completed until the end of 1998. Puget Sound coho and southwest Washington coho are possible candidates for listings.

Recommendations for bull trout listings have been completed, and no western Washington stocks were recommended for listing, however a recent federal court ruling has required USFWS to reconsider its findings on bull trout and another review is currently under way. A status review on cutthroat trout is not expected to be completed until at least December 1998.

The Tribes and ESA

Western Washington treaty Indian tribes have a unique stake in the ESA issue. In exchange for the peaceful settlement of most of the land west of the Cascade Mountains, the tribes reserved the right to continue harvesting fish from all of their usual and accustomed areas in treaties between the tribes and the federal government in the 1850s.

The courts — including the United States Supreme Court — have ruled that the tribes are entitled to half of the harvestable surplus of salmon and steelhead in western Washington. Along with those rights came the responsibility of managing treaty-reserved resources.

Although no western Washington salmon stocks have yet been listed, the tribes already have adjusted treaty-reserved activities because of weak stocks and to protect ESA-protected species.

Gillnet fisheries for sockeye salmon in the San Juan Islands have been altered to reduce the potential impact to the threatened marbled murrelet, a robin-sized sea-going bird that can become entangled in fishing gear.

Some tribes with forestry programs have reduced on-reservation timber harvests to preserve habitat for the endangered northern spotted owl, which, like the marbled murrelet, relies on old-growth timber for survival.

Because tribes have always depended on natural resources for their economic, cultural and spiritual survival, they have become increasingly concerned with the ESA as the list of threatened and endangered species has grown. In the past, tribes have expressed concern that insensitive federal administration of the ESA has interfered with the exercise of treaty rights, the development and management of natural resources, and the practice of traditional religions and ceremonies. Because a large percentage of tribal land is held in trust by the federal government, federal agencies acting on behalf of the tribes were subjecting some of those lands to far more stringent restrictions than private lands. Citing ESA concerns, federal agencies have, for example, delayed or denied approval of projects pivotal to the health and welfare of tribal communities.

Tribes were being penalized for being good stewards of their lands, which were sometimes becoming safe havens for many threatened and endangered species. While not responsible for the loss of habitat and destructive management practices that were contributing to the decline of some species, the tribes were nonetheless being asked to shoulder a disproportionate share of the conservation burden.

Joint Secretarial Order Regarding Tribal Rights, Federal Trust Responsibilities And The Endangered Species Act

In 1996, facing the likely re-authorization of the ESA, treaty Indian tribes from throughout the United States began working with the federal government on an administrative policy that would harmonize the ESA with treaty-reserved rights and resources. In June 1997 the secretaries of Commerce and Interior signed a secretarial order defining the special relationship between treaty Indian tribes, the federal government and the ESA, and addressing tribal rights and the federal government's trust responsibility.

The order recognizes tribal sovereignty and provides the framework within which the tribes and federal government can work cooperatively to develop holistic recovery plans for species listed under the ESA.

“Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws,” the order states.

“The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources.”

Specifically, the order calls for a government-to-government relationship between federal agencies and the tribes that will:

- Promote healthy ecosystems;
- Recognize the tribes as the appropriate entities to manage Indian lands and resources;
- Support tribal measures that preclude the need for conservation restrictions; and
- Be sensitive to Indian culture, religion and spirituality.

The secretarial order says the government “shall give deference to tribal conservation and management plans for tribal trust resources that govern activities on Indian lands and address the conservation needs of the listed species.”

The secretarial order also recognizes tribal concerns regarding access to uses of eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes.

NMFS and USFWS have pledged to work cooperatively with the tribes in applying the secretarial order in the course of the listing process. Other federal agencies will soon follow these efforts as they begin to implement the ESA. Properly implemented, the secretarial order promises to reduce the possibility of long, costly litigation regarding tribal rights, trust responsibilities and the ESA.

Tribal Intervention

From the tribal perspective, the ESA must do more than merely prevent extinction of fish, wildlife and plants by preserving remnant populations that are suited only for museums. The ESA must restore these populations to healthy levels that may again support utilization.

The tribes have seen many streams lose their salmon runs, and they have refused to wait for intervention by the federal government. Steps have already been taken to

strengthen and restore salmon populations in western Washington. Restoring fish — and fish habitat — has been a major tribal goal for many years.

In particular, the tribes have voluntarily made several time, place, and manner restrictions in treaty-reserved salmon fisheries in certain areas where protected species could be present. The tribes and state have always structured their fisheries based on a weak-stock management approach. They work to develop fishery regimes that will have the least impact on the weakest stock while maximizing harvest opportunity on stronger wild and hatchery stocks.

Tribes have also taken the lead on key habitat initiatives such as the Wild Stock Restoration Initiative, Joint Wild Salmonid Policy, Timber/Fish/Wildlife Agreement and others.

Wild Stock Restoration Initiative

State and tribal leaders came together in the early 1990s to develop the Wild Stock Restoration Initiative in response to the poor condition of some salmon stocks and anticipated ESA listings of some wild salmon stocks in western Washington.

The first step was to make an inventory of all salmonid stocks and their health. This systematic, scientific approach to the issue of declining fish runs has given the co-managers a wealth of information on the condition of the health of every salmon and steelhead stock in the state and clearly identifies those fish stocks that need immediate help. Data collection took several years, but the Salmon and Steelhead Stock Inventory is an invaluable tool for beginning restoration efforts.

The second step in the initiative is an inventory of habitat concerns. The Salmon and Steelhead Habitat Inventory Assessment Project will give managers a complete assessment of the effects of habitat loss and degradation in crucial watersheds on the health of all wild stocks.

Joint Wild Salmonid Policy

Another key component of the Wild Stock Restoration Initiative is the joint Wild Salmonid Policy, an umbrella document negotiated by western Washington treaty Indian tribes and the Washington Fish and Wildlife Commission that is nearing completion. The joint Wild Salmonid Policy will lay out a framework to guide and integrate the actions of governments, agencies, industry, organizations and the public to protect and recover wild salmon stocks.

On-the-ground examples of how the policy will work are already showing results. A five-year-old tribal/state/federal effort to rebuild extremely low Hood Canal wild summer chum stocks resulted in near record returns in 1996.

Watershed/Recovery Planning

Regional or watershed initiatives are at the heart of the Joint Wild Salmonid Policy, which calls for protecting and restoring habitat through a combination of locally-based watershed planning and general policy objectives that possess the necessary flexibility to implement performance measures and action strategies in light of local conditions. The policy calls for local watershed councils to develop specific recovery plans to guide how fisheries, habitat and hatcheries are managed. The joint policy represents a significant change from status quo fisheries management by more closely integrating habitat recovery with hatchery and harvest practices.

Comprehensive Species Planning

Comprehensive species planning is just one example of how the tribes and state are responding to the needs of wild salmon in western Washington. Beginning in 1993, the tribes and state have been developing a comprehensive coho management plan to maintain and restore wild stocks in a manner that reflects the region's fisheries objectives, production constraints and production opportunities.

Specific objectives of the comprehensive coho approach have been identified and include: protecting the salmon production base and providing incentives for

increased production; meeting allocation obligations, including treaty Indian fishing rights; stabilizing harvest levels on a year-to-year basis; and improving the current management approach.

Changes have been proposed — and in some areas, already made — in annual harvest management. Conflicts will be reduced by establishing pre-determined management actions for specific resource conditions. There will be a shift from pre-season fishery planning to in-season and post-season stock assessment. This approach is intended to work in concert with freshwater habitat improvements to optimize production capability.

A process similar to the comprehensive coho management plan is envisioned for chinook management in western Washington. The pace of comprehensive chinook management planning could be increased with the anticipated listing proposals for Puget Sound chinook salmon in early 1998.

Conclusion

While the ESA can help prevent species important to tribal communities from becoming extinct, it can be administered in a manner that conflicts with federal trust responsibilities, treaty-reserved rights and tribal sovereignty. Tribes hold endangered species protection to a higher standard than the ESA's species-by-species approach to preventing extinction. Tribes believe that resources and the ecosystems on which they depend must be managed in a holistic manner that recognizes all things are connected.

Results of the Wild Stock Restoration Initiative -- and the many ongoing efforts of the tribes and state to address the decline of wild salmon stocks -- will figure prominently in the ESA decision-making processes.

For More Information

For more information about the natural resource management activities of the treaty Indian tribes in western Washington, contact the Northwest Indian Fisheries Commission, 6730 Martin Way E., Olympia, WA, 98516; or call (360) 438-1180. The NWIFC home page is available on the World Wide Web at <http://mako.nwifc.wa.gov>.